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In the Supreme Court of the United States

OCTOBER TERM, 1971

SECURITIES AND EXCHANGE COMMISSION, PETITIONER

v.

MEDICAL COMMITTEE FOR HUMAN RIGHTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION

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OPINIONS BELOW

The opinion of the court of appeals (App. 47–80) is reported at 432 F. 2d 659.

JURISDICTION

The judgment of the court of appeals (App. 80–81) was entered on July 8, 1970, and a timely petition for rehearing and suggestion for rehearing *en banc* were denied on August 26, 1970 (App. 81–82). On November 16, 1970, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including December 24, 1970. The petition was filed on the latter date, and was granted on March 22, 1971 (App. 82). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTES AND RULES INVOLVED

The relevant provisions of the Securities Exchange Act of 1934 and the Commission's Rules thereunder are set forth in the Appendix (pp. 49–57, *infra*).

QUESTION PRESENTED

Whether a determination by the Securities and Exchange Commission "to raise no objection" if a company omits a shareholder proposal from its proxy solicitation material is a Commission "order" reviewable in the court of appeals.

STATEMENT

1. Section 14(a) of the Securities Exchange Act of 1934 ("the Act") makes it unlawful to solicit proxies with respect to the securities of certain issuers[1] "in contravention of such rules and regulations as the [Securities and Exchange] Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors." To implement this provision, the Commission has promulgated proxy regulations (17 C.F.R. 240.14a–1, *et seq.*) consisting of nineteen rules and thirty-two separate items. In general, the regulations specify the content and form of proxy solicitation material and require that copies of proposed material be filed with the Commission

[1] Section 14(a) is applicable to the solicitation of any proxy or consent with respect to any security required to be registered pursuant to Section 12 of the Act, 15 U.S.C. 78*l*. Section 12 broadly requires the registration of securities listed on national securities exchanges and of any corporate issuer with total assets in excess of $1 million whose securities are held by at least 500 persons.

prior to distribution. Under Section 21(e) of the Act (15 U.S.C. 78u(e)), compliance with the proxy rules may be enforced by the Commission through a district court action for injunctive relief.

As explained in greater detail below, the Commission's staff examines all proxy materials filed and advises the proxy solicitor whether the material appears to comply with the proxy rules and, if it does not, points out the defects.[2] This examination must be made quickly, in order to enable the company to meet its deadline for distributing the material sufficiently in advance of the shareholders' meeting; it involves considerable informal discussion and negotiation between the staff and the company; and the speed with which the staff's work must be done precludes any extensive study of the material.

One of the proxy rules, Rule 14a–8, requires each company subject to the proxy regulations to include in its proxy-soliciting materials proposals that security holders entitled to vote wish to have considered at a shareholder's meeting. Subsection (c) sets forth certain circumstances in which the company may omit proposals and certain types of proposals that it may omit, including those submitted "primarily for the purpose of promoting general economic, political, racial, religious, social or similar causes" (Rule 14a–8(c)(2)) and those involving " a matter relating to the conduct of the ordinary business operations of the issuer" (Rule 14a–8(c)(5)).

If the company agrees to include a security holder's proposal in its proxy materials, the proposal will come

[2] See 17 C.F.R. 202.3(a), *infra*, pp. 56–57.

to the Commission's attention when the proxy statement, including the proposals, is filed with the Commission in preliminary form before being sent to shareholders. See Rule 14a–6, 17 CFR 240.14a–6, and 17 CFR 202.3(a). On the other hand, if the company "asserts that a proposal * * * may properly be omitted" from its proxy solicitation materials, it is required to notify the security holder who submitted it and to file with the Commission a copy of the proposal and a statement of the reasons why the corporate management "deems such omission to be proper." See Rule 14a–8(d), 17 CFR 240.14a–8(d).

2. Early in 1969, the respondent Medical Committee for Human Rights ("the Committee"), a shareholder in Dow Chemical Company ("Dow"), requested Dow to submit to its shareholders in its proxy solicitation material for the 1969 annual meeting a resolution requesting that the company's charter be amended to prohibit the company from manufacturing napalm.[3] Dow decided to omit the proposal "[f]or the reasons set forth in Rule 14a–8(c)(2) and (5)" (App. 14–15). In accordance with Rule 14a–8(d), Dow notified both the Committee and the Commission of its decision, setting forth its reasons and including a "supporting opinion" of its general counsel (App. 12–15).

[3] The Committee made a similar request in 1968 (App. 7–9), but Dow received it too late for inclusion in the 1968 proxy statement (App. 9). The Committee in 1968 proposed a resolution requesting a charter amendment restricting Dow's sale of napalm (App. 8), but the proposal finally submitted for 1969 was modified to request an amendment barring the company from making napalm (App. 17–18).

The Committee then modified its proposal to meet "certain of the objections" raised by Dow, and asked Dow to include the modified proposal in its proxy material (App. 16–18). The Committee requested the Commission's staff to review the matter if Dow should decide to omit the modified proposal and for oral argument before the Commission if the staff should raise no objection to a Dow decision to omit (App. 18). Dow again informed the Committee and the Commission that it would not include the proposal (App. 19).

On February 18, 1969, the Commission's staff informed the Committee and Dow that it would "not recommend any action to the Commission if * * * [the Committee's] proposal is omitted from the [Company's] proxy material" (App. 20–21).[4] The Committee's counsel then sent the Commission a letter renewing its request that the Commission review the staff's position and for the first time giving reasons why Dow should include the Committee's proposal in its proxy material (App. 23–31).

On March 24, 1969, the Commission, as reflected in its minute book, without elaboration, "* * * determined to raise no objection to the omission from the management's proxy statement of certain resolutions proposed by the Medical Committee for Human Rights" (App. 44).[5] The Committee was advised of

[4] In its letter to Dow, the staff indicated that its unwillingness to recommend action was predicated on the "* * * reasons stated in * * * [Dow's] letter and the accompanying opinion of counsel * * *" (App. 21).

[5] The Commission also denied the Committee's request for oral argument (App. 44).

the Commission's determination by telephone the same day (App. 46) and by letter on April 2, 1969 (App. 42–43).

3. On May 29, 1969, the Committee filed a petition for review of the Commission's determination of March 24 in the United States Court of Appeals for the District of Columbia Circuit (App. 4). The Commission moved to dismiss the petition on the ground that nothing it had done was judicially reviewable (App. 44–45). The court denied that motion "without prejudice to renewal thereof in the briefs and at the argument on the merits" (App. 45).

After briefing and argument,[6] the court of appeals held that "the Commission's action in the present case is reviewable" and remanded the case to the Commission "for further administrative proceedings" (App. 47). It ruled that "the relevant jurisdictional statute," Section 25(a) of the Act, authorized such review (App. 53).

The court stated that the Commission's action "operates with sufficient particularity and finality to warrant judicial review" (App. 58), and that the proxy procedures provided in Rule 14a–8 "are possessed of sufficient 'adversariness' and 'formality' to render [the

[6] In its March 24 determination to raise no objection, the Commission had expressed no view on the legal issues raised by the Committee (App. 44). As a result, the Commission limited its argument in the court of appeals to the question whether the agency's action was reviewable and did not discuss the application or interpretation of the exemptive provisions of Rule 14a–8.

Commission's] final proxy determinations amenable to judicial review" (App. 62). The court recognized that "the Medical Committee could obtain a judicial determination of the legitimacy of its claim through a private action against Dow Chemical in the district court" (App. 64), citing *J. I. Case Co.* v. *Borak,* 377 U.S. 426, but concluded that "[d]irect [court of appeals] judicial review of the Commission proxy decisions is unquestionably the most logical and efficient means of achieving [the Congressional] objective" in Section 14(a) of the Act of protecting corporate investors (App. 65).

After an extensive discussion of the standards governing exclusion of security holder proposals and the reasons Dow gave for excluding the Committee's proposal (App. 70–79), the court stated (App. 80):

> In light of these considerations, therefore, the cause must be remanded to the Commission so that it may reconsider petitioner's claim within the proper limits of its discretionary authority as set forth above, and so that "the basis for [its] decision [may] appear clearly on the record, not in conclusory terms but in sufficient detail to permit prompt and effective review." [Brackets in original; footnote omitted.]

SUMMARY OF ARGUMENT

The review of proxy solicitation material by the Securities and Exchange Commission is informal and cursory, designed expeditiously to assist persons to comply with the Commission's proxy rules. The Com-

mission makes no attempt definitively to determine whether particular material complies with the rules; its staff merely advises the proxy solicitor whether the material appears to do so and, if not, what changes are necessary to remedy the deficiencies. The Commission cannot compel compliance with the rules through administrative proceedings; its only method of enforcement is to institute a suit for injunctive relief in the district court. Although proxy solicitors need not follow the advice of the Commission or its staff, they generally do so, since their primary objective is to insure prompt distribution of the proxy material with a measure of assurance that the Commission will not institute an injunctive action.

Section 25(a) of the Securities Exchange Act of 1934, which the court of appeals recognized is "the relevant jurisdictional statute" (App. 53), permits review only of "an order issued by the Commission in a proceeding" under the Act. The statute permits review only of "orders of a definitive character dealing with the merits" (*Federal Power Commission* v. *Metropolitan Edison Co.*, 304 U.S. 375, 384). The Commission's advice to Dow that it would raise no objection should Dow omit the Committee's proposal from its proxy soliciting material is not such an "order." The Commission did not definitively determine any rights of the Committee or definitively adjudicate the controversy between the Committee and Dow.

The Commission did no more than advise Dow that the agency would not institute an enforcement suit. Section 21(c) of the Act explicitly commits that decision to the discretion of the Commission. That discretionary determination is not judicially reviewable, even though it is claimed that in so deciding the agency acted upon erroneous legal premises. *Schilling* v. *Rogers*, 363 U.S. 666.

The Committee can at any time bring an action in the district court to enjoin Dow from violating the proxy rules. *J. I. Case Co.* v. *Borak*, 377 U.S. 426; *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375. It could do so without first going to the Commission, and the Commission's determination to take no action against Dow would be legally irrelevant in such a suit. Moreover, only in such a district court action could the Committee obtain the full relief it is seeking through this litigation, *i.e.*, compelling Dow to distribute the proposal; the court of appeals recognized that it could not order Dow to do that.

Appellate review of the Commission's determination to take no action, moreover, would serve no meaningful purpose. It could be of little help to the complaining security holder, since the decision could not require the company to do anything. On the other hand, it would tend to stultify the Commission's informal procedures that over the years have resulted in effective administration of its proxy rules for the benefit of security holders.

ARGUMENT

SECTION 25(a) OF THE SECURITIES EXCHANGE ACT OF 1934 DOES NOT AUTHORIZE JUDICIAL REVIEW OF A DETERMINATION BY THE SECURITIES AND EXCHANGE COMMISSION TO RAISE NO OBJECTION SHOULD A CORPORATION OMIT A SECURITY HOLDER'S PROPOSAL FROM ITS PROXY SOLICITATION MATERIAL

The court of appeals held that the Commission's determination "to raise no objection" if Dow should omit the Committee's proposal from the company's proxy solicitation material was an agency "order" subject to judicial review under Section 25(a) of the Securities Exchange Act of 1934. The correctness of that holding depends upon the nature of the agency determination. If, as we contend, the Commission's action involved no more than an informal decision that there was no occasion for the agency to act if Dow were not to include the Committee's material, and if that decision has no legal effect upon the Committee's rights, then under settled principles the Commission determination is not judicially reviewable.

Accordingly, we shall first explain the precise nature of Commission review of proxy solicitation material. This requires consideration of the development of the agency's proxy review procedures—a practice which evolved from the Commission's review of securities registration statements under the Securities Act of 1933—and a careful analysis of the precise effects of a Commission determination not to object to a company's refusal to include a security holder's proposal in its proxy solicitation material.

To place the discussion in proper perspective, certain basic facts relating to Commission review of proxy materials must be borne in mind. The Commission has no authority to take any administrative action to enforce the proxy rules; its sole remedy with respect to a violation is to institute a suit for injunctive relief against the company in the district court. A security holder himself may institute such a suit at any time, whether or not he has complained to the Commission.

Since the agency promulgated the first proxy rules thirty-five years ago, it has followed a practice of informally reviewing proxy materials to give the proxy solicitor its prompt judgment on whether distribution of the material would be in conformity with the rules. Because of the large number of proxies filed each year and the short time the staff has to consider them, the review is speedy and necessarily cannot involve the kind of in-depth study that typically precedes an agency's adjudicative or dispositive decision. The process is one of informal consultation and negotiation between the staff and the solicitor. The Commission's review of proxy materials thus is purely advisory, not adjudicatory; the Commission does not attempt definitively to determine whether particular material complies with the rules or to decide disputes among security holders or between security holders and management relating to the rules.

Since companies ordinarily are more interested in distributing the materials promptly than in contesting legal issues, the Commission rarely finds it necessary to resort to enforcement litigation to correct

whatever apparent deficiencies its examination of their material discloses. When the Commission advises a company, as it did in this case, that it will not object if the filed materials are distributed, this is another way of telling the company that the agency will not institute an enforcement suit. That decision, however, does not involve any determination of any dispute respecting the proxy materials; the Commission's decision not to object if Dow did not distribute the Committee's proposal did not bind the Commission, the Committee or Dow in any subsequent litigation in which any of them might be involved.

A. COMMISSION REVIEW OF PROXY SOLICITATION MATERIAL DOES NOT RESULT IN A DEFINITIVE DETERMINATION WHETHER THE MATERIAL COMPLIES WITH THE PROXY RULES.

1. Since the earliest days of its existence, the Commission has utilized informal administrative action rather than formal administrative proceedings in situations where the need for speed and the character of the agency's function normally made such formal proceedings inappropriate.[7] The first of the federal

[7] The Commission's rendering of informal advice through such procedures has been commended as an "excellent practice in administrative procedure." Commission on Organization of the Executive Branch of the Government, *Task Force Report on Legal Services and Procedures* (1955), p. 189. See also, Report of the Committee on Administrative Procedure, *Administrative Procedure in Government Agencies*, S. Doc. No. 8, 77th Cong., 1st Sess. 39–40 (1941); Aranow & Einhorn, *Proxy Contests for Corporate Control* 294–297 (2d ed. 1968); III Loss, *Securities Regulation* 1894–1896 (2d ed. 1961), VI Loss, *id.* 4023–4026 (Supp. 1969); 1 Davis, *Administrative Law Treatise* Section 4.09 (1958); Cary, *Administrative Agencies and the*

securities laws, the Securities Act of 1933, requires that a registration statement covering securities to be publicly sold must be filed with the Commission 20 days before its effective date. 15 U.S.C. 77h(a). If the Commission concludes that a statement is false or misleading, it can initiate formal administrative proceedings in which, after notice and hearing, it can deny or revoke the effectiveness of the statement. 15 U.S.C. 77h(b) and (d).

The Commission quickly realized, however, that it would be impossible for it as a practical matter to take such formal action in any substantial number of cases. Report of the Committee on Administrative Procedure, *Administrative Procedure in Government Agencies*, S. Doc. No. 8, 77th Cong., 1st Sess. 40 (1941).[8] As a result there evolved the informal deficiency letter or letter of comment, in which the staff indicated to the issuer its views as to any deficiencies in the statement and gave the issuer the opportunity to correct them before the statement became effective. This procedure aided compliance with the disclosure requirements of the Act without the need for protracted formal administrative proceedings, the very

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Securities and Exchange Commission, 29 Law & Contemp. Prob. 653, 660 (1964); Cohen & Rabin, *Broker-Dealer Selling Practice Standards: The Importance of Administrative Adjudication in Their Development*, 29 Law & Contemp. Prob. 691, 692 (1964); Von Mehren & McCarroll, *The Proxy Rules: A Case Study in the Administrative Process*, 29 Law & Contemp. Prob. 728, 748 (1964).

[8] This report was a landmark study of administrative procedure; we cite it hereafter as *Report*.

initiation of which could cause serious problems in selling the securities.[9]

Unlike the Securities Act of 1933, which requires the filing of registration statements prior to their effective date and specifies in considerable detail the information they must contain (15 U.S.C. 77g), the Securities Exchange Act of 1934 merely prohibits the solicitation of proxies "in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors" (Section 14(a), 15 U.S.C. 78n (a)). Congress thus left it to the Commission to prescribe not only the substantive standards governing the solicitation of proxies, but also the procedures to be followed. That Act, however, differs from the Securities Act of 1933, in that Congress made no provision for the Commission to initiate formal administrative procedures to prevent violations of the proxy rules;[10]

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[9] *Report*, 40: "[T]he securities must be sold upon prospectuses which command public confidence. * * * [T]he mere institution of proceedings which criticize the completeness or accuracy of a statement is, as a practical matter, a serious and probably fatal blow to the proposed offering." In recognition of this fact, the Commission determined that it would initiate formal administrative proceedings only if it appeared that there was a deliberate attempt to mislead investors. Cf. 17 C.F.R. 202.3(a). See generally, Blair-Smith, *Forms of Administrative Interpretation Under the Securities Laws*, 26 Iowa L. Rev. 241, 249–250 (1941); Johnson & Jackson, *The Securities and Exchange Commission: Its Organization and Functions Under the Securities Act of 1933*, 4 Law & Contemp. Prob. 3, 10–11 (1937).

[10] Compare Section 12(e) of the Public Utility Holding Company Act of 1935, 15 U.S.C. 79*l*(e), which "consistently with the regulatory philosophy of the Holding Company Act" (II Loss, *Securities Regulation* 866 (2d ed., 1961)), makes unlawful the solicitation of "any proxy" * * * regarding any security of a registered holding company or a subsidiary company thereof in contra-

the only sanction available to the agency to prohibit a violation is to initiate a district court suit for an injunction, under Section 21(e) of the Act, 15 U.S.C. 78u(e).[11]

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vention of such rules and regulations *or orders* as the Commission deems necessary or appropriate * * * for the protection of investors or consumers or to prevent the circumvention of the provisions of [that Act] or the rules, regulations, *or orders* thereunder" (emphasis supplied). Rule 62 under that Act, 17 C.F.R. 250.62, implements this provision by establishing formal administrative procedures with respect to consideration of certain types of soliciting material, which lead to a formal Commission order.

[11] See II Loss, *Securities Regulation* 931 (2d ed., 1961). Former Commission Chairman Armstrong summarized the agency's power here in *Hearings before a Subcommittee of the Senate Committee on Banking and Currency on S. 879, Stock Market Study (Corporate Proxy Contests)*, 84th Cong., 1st Sess. Pt. 3 (1956) (hereafter cited as *1956 Hearings*), pp. 1540–1542 as follows:

> * * * [O]ur only legal remedy [for a proxy rule violation] is to seek an injunction in the Federal court * * *.
>
> * * * * *
>
> The Commission has no authority under the statute or its rules, by its own administrative action, to compel correction of false or misleading proxy material, to prevent solicitations in disregard of the rules, to prevent the use of false or misleading proxy material, to compel or prevent or delay the holding of a meeting or to compel or to prevent the voting of proxies even though they may have been solicited and secured on the basis of fraud.

See also Aranow & Einhorn, *Corporate Proxy Contests: Enforcement of SEC Proxy Rules by the Commission and Private Parties*, 31 N.Y.U. L. Rev. 875, 876, 886–887, and n. 50 (1956); Armstrong, *The SEC and Proxy Contests*, 182 Comm. & Fin. Chron. 875, 888 (1955); Loss, *The SEC Proxy Rules in the Courts*, 73 Harv. L. Rev. 1041, 1043–1044 (1960); *Hearings before the House Committee on Interstate and Foreign Commerce on H.R. 1493 (SEC Proxy Rules)*, 78th Cong., 1st Sess. 81–82 (1943) (hereafter cited as *1943 Hearings*) (Statement of Commission Chairman Purcell).

The Commission's first proxy rules, adopted in 1935, did not require that the materials be filed with the agency before distribution; they merely specified certain information that had to be disclosed. Securities Exchange Act Release No. 378 (September 24, 1935) (Class A). This arrangement proved unsatisfactory, however, because there were a number of instances in which the Commission, upon examining the material that had been distributed, concluded that it had not complied with the rules and requested the company to make a supplemental solicitation.[12] In 1938 the Commission advised persons "desiring informal opinions or suggestions" in connection with proxy material to present the request "as far in advance of the solicitation as practicable." Securities Exchange Act Release No. 1823 (August 11, 1938), p. 2. The procedure did not materially reduce the number of proxy solicitations in violation of the rules, and in 1940 the Commission amended its rules to require, as they have provided ever since, that proxy materials be filed with the agency for its inspection prior to solicitation. Securities Exchange Act Release No. 2376 (January 12, 1940), p. 2. See *1943 Hearings, supra*, n. 11, pp. 15–16.

The prefiling requirement enables the agency to examine and comment upon the proposed proxy material before distribution to security holders. In accordance with the agency's practice (17 C.F.R. 202.3(a), 202.1(d)), the examination ordinarily is made by the staff, with participation by the Commission itself only

[12] *1943 Hearings* at p. 15 (statement of Commission Chairman Purcell).

in those relatively rare cases where unusual problems exist and the staff or an interested person requests it. The rules admonish that final printing of the proposed material should be deferred "until the comments of the Commission's staff have been received and considered" (Note, Rule 14a-6(f), 17 CFR 240.14a-6(f)). The development of this informal review to encompass all proxy filings has been described as "[p]robably the most important development in the field of proxy regulation * * *."[13]

The Commission's rules with respect to security holder proposals underwent a similar development reflecting the Commission's practical experience in dealing with them. In 1938 the Commission took the view that a proxy statement was misleading if management did not indicate any security holder proposals which it knew would be presented at the meeting and against which it intended to vote the proxy it was soliciting. *1943 Hearings,* pp. 16, 118, 169, 170;[14] Securities Exchange Act Release No. 1823 (August 11, 1938), p. 14. It provided a requirement for such disclosure

[13] Aranow & Einhorn, *Corporate Proxy Contests: Enforcement of SEC Proxy Rules by the Commission and Private Parties*, 31 N.Y.U. L. Rev. 875, 876 (1956).

[14] As Commission Chairman Purcell explained at the *1943 Hearings* (p. 170):

> The proxy statement purports to tell the stockholders everything that is going to be taken up at the meeting. The management knew these proposals were going to be taken up at the meeting. It knew that it intended to oppose them. Any statement which did not include those proposals and the position of the management was obviously misleading, because the soliciting material purported to tell the stockholders everything that is going to be taken up at a meeting that the management knew about.

in an amendment of the rules in 1940, which also required that the proxy itself provide a space for the shareholder to vote on the proposal. Securities Exchange Act Release No. 2376 (January 12, 1940), p. 3. Two years later the rules were amended to require the company to include proposals of which it had been given reasonable notice by the security holder.[15] A 1947 amendment required the company to notify the Commission when it filed its preliminary material of any security holder proposality intended to omit;[16] in 1954 a further amendment required the company to give such notice to

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[15] Securities Exchange Act Release No. 3347 (December 18, 1942). The 1942 amendment also required the company to distribute a 100-word statement submitted by the shareholder in support of his proposal. As Chairman Purcell explained (*1943 Hearings*, p. 112):

> * * * the company will then present them [the proposals], or usually does, with their preliminary proxy material * * *. [W]e take the facts which are submitted to us either by the company or which we can get anywhere else, and if it appears right from the face of the statements, in the light of the facts that we know that the [100-word] statement is false or misleading, we will tell the company they need not carry it.

On the other hand, he pointed out:

> If we * * * believed that * * * the statement [in support of the shareholder proposal] was not false or libelous, we would advise the management that in our opinion it was necessary for them to include the 100-word statement. Under those circumstances, if the management insisted on sending out its material without the 100-word statement, we would sue for an injunction restraining them from sending out their material without including the 100-word statement. In such a proceeding the court would, of course, determine definitively whether we were correct in our position.

Id. at 118.

[16] 12 Fed. Reg. 8768 (Dec. 24, 1947) at p. 8770.

the Commission before it filed its materials.[17] Amendments in 1948, 1952 and 1954 specified circumstances in which the company was not required to include security holder proposals.[18]

2. Thus, over the years the information required to be included in proxy soliciation materials, the time for filing such materials with the Commission and company obligations with respect to security holder proposals underwent significant development and improvement. But two interrelated aspects of the Commission's review of proxy materials, which are critical to the present case, remained the same. (a) The Commission's sole purpose in conducting such review has been to insure full disclosure to public investors. (b) The Commission has never purported or attempted defin-

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[17] The Commission explained this as follows (Securities Exchange Act Release No. 4979 (January 6, 1954) at p. 2):

> So that the Commission will have more time to consider the problems involved in such cases and the security holder will have an opportunity to consider the management's position and take such action as may be appropriate, the amended rule provides that a copy of the proposal and a statement of reasons for its omission must be furnished to the Commission and the security holder not later than 20 days prior to the date of filing the management's preliminary proxy material.

[18] See Securities Exchange Act Release No. 4114 (July 6, 1948), p. 2 (proposed amendment), and Securities Exchange Act Release No. 4185 (November 5, 1948) (amendment as adopted); Securities Exchange Act Release No. 4775 (December 11, 1952), pp. 7–9; and Securities Exchange Act Release No. 4979 (January 6, 1954), pp. 4–5.

itively to determine whether particular proxy material complied with the rules.[19]

a. The Commission, of course, has no interest in the merits of particular security holder proposals; the right of security holders to present proposals at

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[19] The court below predicated its holding (App. 61–62) that the Commission's informal review of security holder proposals constituted a formal adjudicatory procedure in part on the following language contained in the release adopting the 1954 amendment to the security holder proposal rule (providing for advance notice to the Commission of management's intent to omit a security holder proposal):

> The rule places the burden of proof upon the management to show that a particular security holder's proposal is not a proper one for inclusion in management's proxy material.

Securities Exchange Act Release No. 4797 (January 6, 1954), p. 2.

But the 1954 amendment itself did not purport to set up adjudicatory procedures. The language in the release is consistent with the burden on any proxy solicitor to show the staff that its materials comply with the applicable rules. As Commission Chairman Armstrong testified two years later:

> The accuracy of the statements made and the truth and adequacy of proxy material are the responsibility of the persons soliciting proxies. It is not the Commission's. At the administrative level, at least, the burden is on the user to establish that his facts, arguments, and charges are true and not misleading. It is not and cannot be the Commission's function to prove the truth, accuracy, and fairness of every piece of proxy material filed with us.

1956 Hearings, p. 1546.

Indeed, the Commission's contemporaneous interpretation of its rules and contemporaneous comments were in accord that the Commission did not intend either to expand security holder rights or to create any procedures whereby security holders could vindicate, through the Commission, their limited right to have proposals included in the proxy statement. See, *e.g.*, Bayne, Caplin, Emerson & Latcham, *Proxy Regulation and the Rule-Making*

the meeting turns upon state law.[20] The Commission's sole concern is to insure that the public investors receive full and accurate information about all security holder proposals that are to or should be submitted to them for their action. If the company fails to distribute a security holder proposal that it should have included, the other security holders have not only been denied necessary information and the opportunity to vote for a proposal they favor, but unwittingly may have given a proxy that management would vote against the proposal.

Process: The 1954 Amendments, 40 Va. L. Rev. 387, 388 (1954); Letter of Byron D. Woodside, Director of the Commission's Division of Corporation Finance ('52–'56 Transfer Binder), CCH Fed. Sec. L. Rep. ¶ 90,659 (Mar. 4, 1954) at p. 92,003; Aranow & Einhorn, *Corporate Proxy Contests: Enforcement of SEC Proxy Rules by the Commission & Private Parties*, 31 N.Y.U. L. Rev. 875, 886–887 and n. 59 (1956).

[20] As former Chairman Demmler stated:

> The stuff of these controversies [under the Securities and Exchange Commission's proxy rules] is the sort of thing which courts have been adjudicating since corporate elections began. The injury to the complainant, real or fancied, may, and usually does, include substantive matters unrelated to the proxy rule violation.

Demmler, *Private Suits Based on Violation of the Proxy Rules*, 20 U. Pitt. L. Rev. 587, 591 (1959), cited in Loss, *The SEC Proxy Rules and State Law*, 73 Harv. L. Rev. 1249 (1960). Accord, *1943 Hearings*, pp. 133–134, 172, 180, 181.

See, also, *1943 Hearings*, pp. 99–100 (Commission Chairman Purcell):

> Of course, the rules govern the solicitation of the proxies. I do not want to appear to hammer this, but it is a fact they govern the solicitation of proxies and not what happened at the meeting, and it is rather difficult to give you good answers to questions concerning actions which do not in the main concern our Commission * * *.

b. Staff review of proxy solicitation materials is concentrated in the two or three months in the spring when most corporate meetings are held. In the 1970 fiscal year the agency reviewed more than 5500 proxy statements.[21] With its limited staff and the need for rapid examination, the Commission necessarily cannot do more in each case than make a quick analysis of the material submitted that perforce lacks the kind of in depth study that would be essential to a definitive determination whether a particular filing complies with the rules. Indeed, it was the impossibility generally of making definitive determinations in formal proceedings with respect to registration statements that led the Commission to initiate the informal review of those statements that is now the keystone of Commission enforcement of the registration provisions of the Securities Act of 1933. See *supra,* p. 13.

What the Commission staff does in reviewing proxy materials is to make a prompt judgment, based upon the materials before it, whether the solicitation seems to comply with the rules. The staff then explains to the company the respects in which it believes that the materials are deficient, in an attempt to persuade the company to change them to conform with the rules, and thereby to provide more accurate information to public investors.[22] If, on the other hand, the staff con-

[21] Securities and Exchange Commission, *Thirty-Sixth Annual Report*, p. 46.

[22] Staff review also "make[s] it possible for the staff to advise the Commission whether it appears that the person

cludes that the proxy materials as filed appear to satisfy the rules, it so informs the company. The latter thereby obtains some measure of assurance that, if it distributes the materials as filed, the Commission will not seek to enjoin the solicitation by filing an injunction suit. That occurred in this case on the staff level, when the staff informed Dow that it would "not recommend any action to the Commission" if the company omitted the Committee's proposal from its materials (App. 20–21).

Similarly when the Commission itself decided "to raise no objection" if Dow omitted the Committee's proposal, it merely declined to interfere with the staff's conclusion or to institute an enforcement suit. The Commission's decision might have resulted from one or more considerations. For example, the agency might have concluded that, without a detailed study of the case, it could not firmly conclude that the rules required Dow to include the Committee's proposal. Or it might have decided that, whatever might be the merits of the case, the issue did not warrant initiating an enforcement suit.

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soliciting is or is not complying with the [proxy] requirements, and in the event of noncompliance, to permit an appropriate recommendation as to what action to enforce the rules the Commission might wish to pursue." *Hearings before a Subcommittee of the Senate Committee on Banking and Currency on SEC Enforcement Problems*, 85th Cong., 1st Sess. Pt. 1 (1957), pp. 17–18 (testimony of Commission Chairman Armstrong).

It is, of course, impossible to know the precise basis of the Commission's decision, because the Commission gave no reason for it. But the Commission was not required to give any reasons, since its action here consisted of no more than informal advice to the company as to what course the agency would follow if Dow should continue to refuse to include the Committee's proposal in its proxy materials.

In sum, neither the staff nor the Commission makes any definitive determination of whether particular proxy materials comply with the rules when it advises the company as to its views on compliance. The proxy rules themselves explicitly so state. Rule 14a–9(b), 17 C.F.R. 240.14a–9(b), provides:

> The fact that * * * proxy * * * soliciting material has been filed with or examined by the Commission shall not be deemed a finding by the Commission that such material is accurate or complete or not false or misleading, or that the Commission has passed upon the merits of or approved any statement contained therein or any matter to be acted upon by security holders. * * *

See also, Section 26 of the Act, 15 U.S.C. 78z.[23]

In 1956 the Chairman of the Commission pointed out to Congress that over the years there had de-

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[23] That section provides:

> No action or failure to act by the Commission * * *

veloped a misconception of what the agency does in reviewing proxy materials—there was "the popular notion that we 'approve' * * * or 'clear' or 'permit' the use of proxy material."

> These characterizations of our action or nonaction are not accurate. What actually is involved is that the staff of the Commission concludes on the basis of the submitted proxy material and any other information available to the Commission that, on its face, there has not been a failure, on the part of the person who has submitted the material, to comply with the standards of the proxy regulations.[24]

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in the administration of this chapter [the Act] shall be construed to mean that * * * [the Commission] has in any way passed upon the merits of, or given approval to, any security or any transaction or transactions therein; nor shall such action or failure to act with regard to any statement or report filed with or examined by such authority pursuant to this chapter or rules and regulations thereunder, be deemed a finding by such authority that such statement or report is true and accurate on its face or that it is not false or misleading. * * *

[24] *1956 Hearings*, pp. 1545–1546 (testimony of Chairman Armstrong).

See also Dean, *Twenty-Five Years of Federal Securities Regulation by the Securities and Exchange Commission*, 59 Colum. L. Rev. 697, 737 (1959):

> Under the Exchange Act, the SEC has no duty to verify the material in proxy statements. Indeed, the SEC has found over the years that in practice it is not able to

The court of appeals was thus in error in suggesting that the Commission's decision "to raise no objection" if Dow omitted the Committee's material was "an adverse Commission determination" on the merits (App. 57; see App. 68, 71) and in stating that the agency "adopted" the staff's determination reflecting the views of Dow's counsel (App. 76).

3. One of the factors upon which the court of appeals relied in holding the Commission's determination reviewable was its belief that Commission review of security holder proposals differs from Commission informal review of other proxy matters—and, indeed, from Commission informal review generally—in that, in dealing with security holder proposals, opposing points of view frequently are presented to the agency (App. 59–60). But if, as we have argued, the Commission decision here "to take no action" involves no determination of the merits of the dispute between Dow and the Committee, the character of that decision was not altered because it was made after considering the views of both parties to the dispute. In any event, the court was mistaken in assuming that conflicting viewpoints are not presented to the Commission in its informal review of other subjects.

In contests for corporate control, "[o]ne contestant may complain to the Commission that the other's

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verify the facts in proxy statements, no matter how carefully its staff goes over them.

Particularly in an election or merger contest, * * * the fast changing barrage and counter-barrage in the limited period between the calling and holding of a stockholders' meeting does not lend itself to administrative hearings and findings of fact.

material is false or misleading and seek the Commission's aid to secure retraction or correction administratively, or, and this is quite common, petition the Commission to commence legal action against the other side."[25] Even apart from proxy contests, the Commission frequently receives complaints from security holders after proxy material has been disseminated that it is inaccurate[26] and sometimes is requested to ask the company to send out corrective material. Similarly, there may be opposing points of view when the staff issues so-called "no action" letters to persons asking whether securities not registered under the Securities Act of 1933 can be sold, in which the staff advises the seller it will not recommend enforcement action to the Commission if the proposed transaction is effected. In such situations the issuer, upon learning of the request for a no-action letter by a stockholder, may be concerned that the distribution will in fact turn out to be a public offering that would subject the issuer to liability under the statute if the securities were not registered and urge the Commission not to issue the letter.[27]

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[25] *1956 Hearings*, p. 1552 (testimony of Chairman Armstrong). See also Armstrong, *More About the SEC's Proxy Rules*, 181 Comm. & Fin. Chron. 2645, 2665 (1955); Dean, *Twenty-Five Years of Federal Securities Regulation by the Securities and Exchange Commission*, 59 Columbia L. Rev. 697, 737 (1959).

[26] See, *e.g.*, *Gerstle* v. *Gamble-Skogmo, Inc.*, 298 F. Supp. 66 (E.D. N.Y.).

[27] Cf. *Kanton* v. *U.S. Plastics, Inc.*, 248 F. Supp. 353, 357 (D. N.J.).

B. THE COMMISSION'S DETERMINATION TO TAKE NO ACTION IF DOW SHOULD NOT INCLUDE THE COMMITTEE'S PROPOSAL IN ITS PROXY MATERIALS IS NOT A REVIEWABLE ORDER UNDER SECTION 25(a) OF THE ACT

1. Section 25(a) of the 1934 Act, which the court of appeals recognized is "the relevant jurisdictional statute" (App. 53), provides: "Any person aggrieved by an order issued by the Commission in a proceeding under this chapter [the Act] to which such person is a party may obtain a review of such order" in the court of appeals.

Within the meaning of that Section, the informal procedures by which the Commission reviews proxy material to enable it to advise the company whether it complies with the Act is not "a proceeding under [the Act]"; the Commission's decision "to raise no objection" is not "an order issued by the Commission." The statute covers only orders that definitively determine the rights and obligations of parties. The Commission's action in this case did not have this consequence.

The kind of agency action that Section 25(a) makes reviewable ordinarily is taken after formal administrative proceedings.[28] The statute was directed toward such orders, and contemplates review of essentially "judicial action" by the Commission. See *American*

[28] The Committee never suggested that the procedures provided by the Commission's rules for formal adjudication (see 17 C.F.R. 201.1 *et seq.*) applied to the agency's review of Dow's proxy materials.

Sumatra Tobacco Corp. v. *Securities and Exchange Commission,* 93 F. 2d 236, 239 (C.A.D.C.). Thus, Section 25(a) provides for the filing of the administrative record with the court of appeals, makes the Commission's findings "as to the facts" conclusive if supported by substantial evidence, and permits the court to remand the case to the agency to receive "additional evidence" and make further findings. In dealing with a substantially identical provision for judicial review in *Federal Power Commission* v. *Metropolitan Edison Co.,* 304 U.S. 375, this Court stated (p. 384):

> * * * The provision for review thus relates to orders of a definitive character dealing with the merits of a proceeding before the Commission and resulting from a hearing upon evidence and supported by findings appropriate to the case.

Although, as the court of appeals pointed out (App. 58–59), the fact that the agency acted without a formal evidentiary hearing no longer makes its action non-reviewable, review still is available only for "orders of a definitive character dealing with the merits" (*Metropolitan Edison, supra*).

In the present case, as we have discussed in Part A, above, the Commission's decision to take no action was not a "definitive" determination "dealing with the merits" of the controversy between Dow and the Committee. As developed below, the Committee or Dow could disregard it and take whatever action it deemed appropriate. The Committee could immediately have

filed suit in the district court to compel Dow to include its proposal in the company's materials; in such a suit, the Commission's determination would be legally irrelevant. See *infra*, pp. 33–34. Indeed, the Commission itself was not bound by that determination, since it could still bring suit against Dow should it appear to the agency that it was violating the proxy rules.[29]

The Commission's action in the present case is thus covered by this Court's description in *United States* v. *Los Angeles R.R. Co.*, 273 U.S. 299, 309–310, 311, of action of the Interstate Commerce Commission if held nonreviewable.

> * * * The so-called order * * * is one which does not command the * * * [company] to do, or to refrain from doing, any thing; which does not grant or withhold any authority, privilege or license; which does not extend or abridge any power or facility; which does not subject the * * * [company] to any liability, civil or criminal; which does not change the * * * [company's] existing or future status or condition; which does not determine any right or obligation. * * * [I]t is at least possible that no proceeding will ever be instituted, either before the Commission or a court, in which the matters now complained of will be involved or in which the errors alleged will be of legal significance.

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[29] See, *e.g.*, *Securities and Exchange Commission* v. *Culpepper*, 270 F. 2d 241, 248–249 (C.A. 2); *Securities and Exchange Commission* v. *Morgan, Lewis & Bockius*, 209 F. 2d 44, 49 (C.A. 3); *cf. United States* v. *City and County of San Francisco*, 310 U.S. 16, 32.

Rochester Telephone Corp. v. *United States*, 307 U.S. 125, on which the court of appeals relied (App. 57–58), does not support reviewability. The Court there held that agency action having an immediate legal impact was not immune from review merely because it was embodied in a "negative order" by which the agency declined to act. In so ruling, however, the Court, citing the *Los Angeles* case, recognized that even agency action that "may have the effect of forbidding or compelling conduct on the part of the person seeking to review it" is not reviewable if the agency action would have such impact "only if some further action is taken by the Commission" (pp. 129, 130–131). In the present case, the fact that the Commission's determination was negative in form does not bar review. Review is barred because the determination did not forbid or compel any conduct and did not definitively decide anything with respect to the controversy between the Committee and Dow; and because it would not have that effect even if "some further action [were] taken by the Commission."

2. The court below concluded that the Committee was "aggrieved" by the agency's action because it had been "forced to undergo a two-stage administrative proceeding, compelled by the risk that failure to do so would preclude any judicial relief by virtue of the exhaustion doctrine" (App. 57), and because the court presumed that the Committee would have the burden of overcoming the agency's decision and would not have the benefit of its assistance in any

subsequent private action the Committee might bring (App. 57).

The exhaustion of administrative remedies doctrine has no application to the proxy review process. This is particularly so in so far as the proponent of a security holder proposal is concerned, since he is not a participant in the review process. The Commission's rules are directed only to the company, as a proxy solicitor, with respect to both the content of the proxy material and the filing of that material (including security holder proposals) with the Commission.[30] A security holder has neither the right to be heard before the Commission with respect to the proxy material, nor the duty to inform the agency concerning his views thereon.[31]

Nor does the Commission's action in any way foreclose the security holder's rights. Regardless of the agency's determination, the security holder still has a well established private remedy—he can initiate his own action in the district court to compel the company to include his proposal. *J. I. Case Co.* v. *Borak*, 377 U.S. 426; *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375. He may do this without even complaining to or

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[30] The Commission's rules do not provide for any submission to it by security holders. In fact, the Commission rejected a suggested rule change to "require the shareholder to file with the SEC a copy of his proposal and related material at the time he submits it to management." Rayne, Caplin, Emerson & Latcham, *Proxy Regulation and the Rule-Making Process: The 1954 Amendments*, 40 Va. L. Rev. 387, 396 (1954).

[31] See Loss, *The SEC Proxy Rules in the Courts*, 73 Harv. L. Rev. 1041, 1064 (1960).

consulting the Commission.[32] Finally, the court of appeals' application of the exhaustion doctrine to the Commission's informal review of proxy filings is at odds with the principle that where an agency cannot accord persons claiming to be aggrieved the full relief they seek (as is the case here, see *infra*, p. 44), they are not required to ask the agency for help. In the circumstances of this case, the exhaustion concept is inappropriate.[34]

The court of appeals' suggestion (App. 57) that in a private action a security holder would have the "burden * * * of overcoming" the "adverse Commission determination" finds some support in cases such as *Union Pacific R. Co.* v. *Chicago & N.W.Ry. Co.*, 226 F. Supp. 400, 408 (N.D. Ill.), which have given weight to a Commission determination not to object to

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[32] In neither *Borak* nor *Mills* did this Court suggest that an application to the Commission was a prerequisite to asserting the private right of action that the Court recognized exists for violation of the proxy rules. Indeed, in neither case does the record indicate that such an application was made.

[33] See *Steele* v. *Louisville & Nashville R. Co.*, 323 U.S. 192, 205–206; *Tunstall* v. *Brotherhood of Locomotive Firemen & Enginemen*, 323 U.S. 210, 213–214; Jaffe, *Judicial Control of Administrative Action*, p. 426 (1965); 3 Davis, *Administrative Law Treatise* § 20.07 (1958); cf. *United States Alkali Ass'n.* v. *United States*, 325 U.S. 196, 210.

[34] In support of its conclusion that a security holder was required to go to the Commission before he can institute a private action, the court of appeals relied upon *Peck* v. *Greyhound Corp.*, 97 F. Supp. 679 (S.D. N.Y.) (App. 57, 62). *Peck* has been criticized as based on a "misunderstanding of the Commission's informal review procedure" concerning security holder proposals. Aranow & Einhorn, *Proxy Contests for Corporate Control*, (2d ed. 1968) p. 465, n.9.

a company's refusal to include a security holder proposal in its solicitation materials. But, for the reasons set forth above, such a Commission determination is not the kind of administrative ruling to which courts should defer. Many courts have accordingly recognized that it is inappropriate to give any weight to such Commission determinations.[35] This conclusion comports with the different way in which an agency decides an issue in an adjudicatory proceeding and decides whether to institute enforcement proceedings. As Judge Learned Hand pointed out:

> * * * the position of a public officer, charged with the enforcement of a law, is different from one who must decide a dispute. If there is a fair doubt, his duty is to present this case for the side which he represents, and leave decision to the court * * * upon which lies the responsibility of decision. * * * Since such rulings need not have the detachment of a judicial, or semi-

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[35] See *Klastorin* v. *Roth*, 353 F. 2d 182 n. 2 (C.A. 2); *Subin* v. *Goldsmith*, 224 F. 2d 753, 774 (C.A. 2), certiorari denied, 350 U.S. 883; *Leighton* v. *One William Street Fund, Inc.* ('64–'66 Transfer Binder), CCH Fed. Sec. L. Rep. ¶ 91,561 (S.D. N.Y.); *Millimet* v. *George F. Fuller Co.* ('64–'66 Transfer Binder), CCH Fed. Sec. L. Rep. ¶ 91,570 (S.D. N.Y.), at p. 95,156. *Securities and Exchange Commission* v. *Henwood* (1961–1964 Transfer Binder), CCH Fed. Sec. L. Rep. ¶ 91,125 (S.D. Cal.), modified and affirmed *per curiam*, 298 F. 2d 641 (C.A. 9), certiorari denied, 371 U.S. 214; VI Loss, *Securities Regulation* 4023–4024 (Supp. 1969). Indeed, in both *Borak* and *Mills*, *supra*, it appears that the Commission had raised no objection to the proxies there attacked.

> judicial decision, and may properly carry a bias, it would seem that they should not be as authoritative * * *.

Fishgold v. *Sullivan Drydock & Repair Corp.*, 154 F. 2d 785, 789 (C.A. 2), affirmed, 328 U.S. 275. See also *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 139–140.

That Commission review of proxy materials involves an enforcement determination rather than an adjudicatory decision was made clear by former Chairman Demmler more than ten years ago, in words that are equally pertinent today (Demmler, *Private Suits Based on Violation of the Proxy Rules*, 20 U. Pitt. L. Rev. 587, 589–590 (1959) (footnotes omitted)):

> The Securities and Exchange Commission is already an overburdened policeman. The Commission has performed its normal function as a law enforcement agency when it has reviewed proxy material to determine whether on its face there appears to have been compliance or noncompliance with the proxy rules and when it has gone to court with an injunction proceeding or made a criminal reference to the Department of Justice in case of a demonstrably serious material violation of those rules.
>
> * * * Since the Commission in enforcing section 14(a) is seeking to compel compliance or to stop or punish noncompliance, its point of view is necessarily that of a policeman and prosecutor rather than that of a judge. The Commission does not pass on private rights.

3. When the Commission determined "to raise no objection" if Dow omitted the Committee's proposal,

it in effect decided not to institute an enforcement action against Dow in the district court. Such a determination is not judicially reviewable—even on the narrow ground given by the court of appeals of ascertaining whether that determination rested on erroneous legal principles.

Section 21(e) of the Act provides that, whenever it appears to the Commission that any person is violating the Act or any rule or regulation thereunder, the agency "may in its discretion bring an action in the proper district court * * * to enjoin such" conduct. In terms, the statute vests complete discretion in the Commission with respect to enforcement actions. It provides no limits or standards, but instead leaves all determinations regarding exercise of the enforcement power to the agency.

This comports with customary practice so far as law enforcement functions are concerned. The enforcement agency has complete discretion whether to institute proceedings. See *Ewing* v. *Mytinger & Casselberry,* 339 U.S. 594; *Waterhouse* v. *Mitchell,* No. 14,872, C.A. 4, decided February 16, 1971, certiorari denied, June 14, 1971, No. 1619, 1970 Term. This broad latitude is important to the proper functioning of a regulatory agency like the Commission, since investigation and litigation are an implementation of its policy-making responsibilities.[36]

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[36] If the courts were to tell the Commission which complaints to investigate or which apparent violations to litigate, the

It is not surprising, therefore, that prior to the decision below the courts had consistently held that the Commission's advisory processes and related enforcement determinations are not judicially reviewable, since they involve "informal or advisory action and not the entry of a formal order in a statutory proceeding." *Standard Fruit & Steamship Co.* v. *Midwest Stock Exchange,* 178 F. Supp. 669, 675 (N.D. Ill.). See *Leighton* v. *Securities and Exchange Commission,* C.A. 2, No. 26,458 (Nov. 3, 1960), certiorari denied, 365 U.S. 888 (1961); *Peck* v. *Securities and Exchange Commission,* C.A. 2, No. 22,289 (Apr. 7, 1952); *Cf. Dyer* v. *Securities and Exchange Commission,* 291 F. 2d 774 (C.A. 8); *Stardust, Inc.* v. *Securities and Exchange Commission,* 225 F. 2d 255 (C.A.

"courts would in effect supersede agency functioning." *Administrative Procedure Act, Legislative History,* S. Doc. No. 248, 79th Cong., 2d Sess. 275 (1946) (hereinafter cited as *Legislative History*). Congress was not insensitive to this problem in providing for judicial review under the Administrative Procedure Act, as the legislative history of that Act shows, *id.* at 38: "A final objection is that this section [the provisions of the Administrative Procedure Act, providing for judicial review] * * * would enable courts to review the failure of an agency to institute proceedings in labor cases. The point made is that, out of the numerous complaints and requests received, the responsible agency must have discretion to choose which shall be set down for proceedings. The answer, however, is that the introductory clause of [the] section [now 5 U.S.C. (Supp. V) 701(a)(2)] * * * expressly exempts 'agency action * * * by law committed to agency discretion.' " See also *id.* at 230; *cf. City of Chicago* v. *United States,* 396 U.S. 162, 165; *Moog Industries, Inc.* v. *Federal Trade Commission,* 355 U.S. 411, 413.

9); *Leighton* v. *Securities and Exchange Commission*, 221 F. 2d 91 (C.A. D.C.), certiorari denied, 350 U.S. 825; *Crooker* v. *Securities and Exchange Commission*, 161 F. 2d 944 (C.A. 1); *Securities and Exchange Commission* v. *Andrews*, 88 F. 2d 441 (C.A. 2); *Third Ave. Ry. Co.* v. *Securities and Exchange Commission*, 85 F. 2d 914 (C.A. 2).[37]

Thus even if the Commission had agreed with the Committee that Dow's omission of the proposal would have violated the proxy rules, the Committee could not have compelled the Commission to institute an enforcement action against Dow. As the court of appeals seemingly recognized (App. 66; but see App. 68 n. 19), that determination lies solely within the agency's discretion. The court, however, concluded

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[37] The nonreviewability of such Commission rulings on proxy matters has been generally recognized for many years. See Aranow & Einhorn, *Proxy Contests for Corporate Control*, 297 (2d ed. 1968); Clusserath, *The Amended Stockholder Proposal Rule: A Decade Later*, 40 Notre Dame Law. 13, 17 (1964); 1 Davis, *Administrative Law Treatise*, Section 4.09 (1958); III Loss, *Securities Regulation* 1926 (2d ed. 1961). Congress declined to act upon a suggestion that reviewable adjudicative procedures be adopted for this area. *1956 Hearings*, p. 1641 (testimony of Edward Aranow). The essentially-similar administrative decision of the National Labor Relations Board or its General Counsel not to initiate unfair labor practice charges under the National Labor Relations Act is likewise not judicially-reviewable. See *Anthony* v. *National Labor Relations Board*, 204 F. 2d 832, 834. (C.A. 6); *Jacobsen* v. *National Labor Relations Board*, 120 F. 2d 96, 99–100 (C.A. 3). See also *National Labor Relations Board* v. *Indiana & Michigan Electric Co.*, 318 U.S. 9, 18.

that it could review the legal theory on which the Commission exercised its discretion, on the ground that "[l]imited and partial review to examine the legal framework within which administrative discretion must be exercised is scarcely a doctrinal innovation" (App. 68).

To be sure, where a statute specifies the standards upon which an agency is to exercise its discretion, a court may consider whether the agency has followed those standards even though the ultimate exercise of discretion itself is not judicially reviewable. That was the situation in *McGrath* v. *Kristensen,* 340 U.S. 162, and *Perkins* v. *Elg,* 307 U.S. 325, upon which the court of appeals relied (App. 68–69). Where, however, the statute provides no standards that govern the exercise of discretion, and thus leaves the matter wholly within the agency's judgment, then the basis upon which the agency exercises its discretion is not reviewable even though it is alleged that the basis reflected errors of law.

That, we believe, is the teaching of *Schilling* v. *Rogers,* 363 U.S. 666. There review was sought of a decision of the Director of the Office of Alien Property that petitioner was not entitled to return of property seized under the Trading with the Enemy Act. Section 32 of that Act provided that the agency "may return" vested property to certain individuals (p. 667). It precluded return to citizens of enemy countries, but excepted from that bar the victims of

persecution. Schilling, a German national, contended he was such a victim, and therefore was entitled to return of the property. The Director ruled that Schilling was ineligible for relief under the exception. This Court held that the Director's decision was not reviewable. Rejecting petitioner's contention that "even though he might not be entitled to judicial review of an adverse administrative determination on the *merits* of his claim, he is nonetheless entitled to such review on the issue of his *eligibility*" (363 U.S. 674–675), the Court ruled that

> the permissive terms in which the § 32 return provisions are drawn (*ante,* p. 667) persuasively indicate that their administration was committed entirely to the discretionary judgment of the Executive branch "without the intervention of the courts." * * * [363 U.S. at 674.]

The Court held that review of the Director's decision could not be had under the Administrative Procedure Act, since Section 10 of that Act bars judicial review of agency action that " 'is by law committed to agency discretion' " (363 U.S. at 670, 676).[38]

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[38] See also, *Panama Canal Co.* v. *Grace Line, Inc.*, 356 U.S. 309, 317–318; *United States* v. *Walker*, 409 F. 2d 477, 480 (C.A. 9); *Knight Newspapers, Inc.* v. *United States*, 395 F. 2d 353, 358 (C.A. 6); *Heffelman* v. *Udall*, 378 F. 2d 109, 111–112 (C.A. 10); certiorari denied, 389 U.S. 926; *Balanyi* v. *Local 1301, Internat'l Bro. of Electrical Workers*, 374 F. 2d 723 (C.A. 7); *Chernock* v. *Gardner*, 360 F. 2d 257, 259 (C.A. 3); *Ferry* v. *Udall*, 336 F. 2d 706, 711–712 (C.A. 9), certiorari denied, 381 U.S. 904; *United States* v. *Wiley's Cove Ranch*, 295 F. 2d 436, 440–

In the present case, Section 21(e) of the Act provides that the Commission "may in its discretion" bring an enforcement action whenever it appears to the agency that the law is being violated. The broad "permissive terms" in which this authority is granted similarly indicate that its "administration was committed entirely to the discretionary judgment of [the Commission] 'without the intervention of the courts' " and that the courts were not intended to review the adequacy of the legal grounds upon which the Commission may have acted.[39] This conclusion also follows from our basic submission that the Commission's decision not to object if Dow omitted the Committee's proposal in no way determined any rights of the Committee; for if that is so, then any legal error involved in that decision had no effect upon the Committee.

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441 (C.A. 8). Cf. *Moog Industries, Inc.* v. *Federal Trade Commission*, 355 U.S. 411, 413; *Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U.S. 103, 106.

[39] There is, in effect, "no law to apply" when the agency makes its determination. See *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 410; *Legislative History* at 212; cf., *id.*, at 275; Saferstein, *Nonreviewability: A Functional Anaylsis of "Committed to Agency Discretion,"* 82 Harv. L. Rev. 367, 370 n. 16 (1968).

In discussing similar language in the Public Utility Holding Company Act of 1935, the court in *Dyer* v. *Securities and Exchange Commission*, 291 F. 2d 774, 781 (C.A. 8), stated that "the Commission has been given absolute discretion as to exercise and exclusive judgment as to field and scope," and that a demand for investigation of an alleged proxy-rule violation invoked the agency's "wholly internal administrative power and function, which the courts have no jurisdiction to compel the exercise of."

4. Finally, even the limited review which the court of appeals has undertaken is unnecessary to protect the Committee's interests, and its probable result is to impede rather than improve the Commission's efforts to protect security holders through informal review of the proxy rules.

a. As we have pointed out, *supra,* pp. 32–33, security holders have an adequate remedy for obtaining a judicial determination of the sufficiency of proxy material and the inclusion of their proposals—they may institute suit in the district court—and the Commission's inaction is legally irrelevant in such a proceeding. Only a district court in such a suit has full power to provide "such remedies as are necessary to make effective the congressional purpose" of Section 14(a) and the rules thereunder. *J. I. Case Co.* v. *Borak, supra,* 377 U.S. at 433; see also *id.* at 431–433.[40] A district court, moreover, is at least as qualified as the Commission or a court of appeals to resolve in the

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[40] In *Borak*, the Court noted (377 U.S. at 431):

> The purpose of § 14(a) is to prevent management or others from obtaining authorization for corporate action by means of deceptive or inadequate disclosure in proxy solicitation. The section stemmed from the congressional belief that "[f]air corporate suffrage is an important right that should attach to every equity security bought on a public exchange." H.R. Rep. No. 1383, 73rd Cong., 2d Sess., 13.

Accord, *Mills* v. *Electric Auto-Lite Co., supra,* 396 U.S. at 381; *Securities and Exchange Commission* v. *Transamerica Corp.,* 163 F. 2d 511, 518 (C.A. 3), certiorari denied, 332 U.S. 847.

first instance the type of controversy which normally arises under Rule 14a–8.[41]

Thus, judicial review of the Commission's determination here is not needed "to safeguard the interests of the plaintiffs." *Hahn* v. *Gottlieb,* 430 F. 2d 1243, 1249 (C.A. 1).

The limited prospect for relief offered by the court of appeals serves to underscore the inappropriateness of the review it has undertaken. The court did not provide any affirmative relief to the Committee or decide whether Dow properly could exclude the Committee's proposal. Since the Commission had not stated reasons for its no-action determination, the case has been remanded to the agency for reconsideration. But even if reasons were articulated, the Commission would be free again "to take no action" with respect to Dow's proxy material.

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[41] The Commission, unlike the district courts, has no expertise on the questions of state law which are frequently critical to the determination of these issues; a proposal inappropriate for shareholder consideration under state law may be excluded. See Rule 14a–8(c)(1), 17 CFR 240.14a–8(c)(1). Three other grounds in the Rules for excluding security holder proposals involve factual issues which the Commission has no means to resolve. Among these is the first basis upon which Dow excluded the Committee's proposal: that it was submitted "primarily for the purpose of promoting general economic, political, racial, religious, social or similar causes" (Rule 14a–8(c)(2), 17 C.F.R. 240.14a–8(c)(2)). A district court is at least as capable as the Commission to resolve the issues involved in the second ground upon which Dow relied: that the proposal related to "the conduct of the ordinary business operations" of the company. Rule 14a–8(c)(5), 17 C.F.R. 240.14a–8(c)(5).

Thus, even if on remand the Commission were to conclude that Dow is required by the proxy rules to include the Committee's proposal, that decision alone would have no legal effect on Dow. Dow could be compelled to include the Committee's proposal in its proxy material only if the agency or the Committee instituted and prevailed in an enforcement action in the district court. Despite the decision below, more litigation is likely to follow before a final resolution of the controversy between the company and the security holder can be adjudicated, resulting in further delay, additional burdens on the courts, and additional expense to security holders with no concomitant benefit to anyone.[42]

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[42] Illustrative is the recent litigation in *Mougios* v. *W. R. Grace & Co.*, CCH Fed. Sec. L. Rep. ¶ 93,038 (S.D. N.Y.), and *Mougios* v. *Securities and Exchange Commission*, C.A. 2, No. 71–1438. These actions were instituted by a shareholder of W. R. Grace & Co. whose proposal was omitted from Grace's proxy materials. The Commission's staff advised Grace that it would not recommend to the Commission that enforcement action be taken if the company omitted the proposal. The Commission declined to consider the matter. Mougios then instituted two actions. In a district court suit against the company he sought to enjoin the holding of the annual meeting for which the proxies had been solicited. Simultaneously, he petitioned the Court of Appeals for the Second Circuit for review of the Commission's determination not to consider the staff's enforcement determination. The district court did not enjoin the meeting and did not reach the "merits." If Mougios prevails in the court of appeals, the Commission may be required to review the staff's enforcement views; if it then agrees with the staff, Mougios will be in the same situation as the Committee, and could, under the decision below, again seek court of appeals review. Of course, all this will not have resolved the basic dispute or compelled Grace to include the proposal; these still are matters for the district court.

b. Important, too, is a balancing of the interests involved to consider "the impact of review on the effectiveness of the agency in carrying out its assigned role." *Hahn* v. *Gottlieb, supra,* 430 F. 2d at 1249. The Commission's processing of proxy materials presently includes gathering information through required filings with the agency and rendering informal advice with regard thereto. The process does not include taking evidence or making an administrative record and findings. The decision below, however, would tend to change this practice.

The remand ordered by the court requires that the Commision conduct "further administrative proceedings" (App. 47) and that it indicate the basis of its decision to take no action against Dow "clearly on the record" and "in sufficient detail to permit prompt and effective review" (App. 80). If the Commission must satisfy this standard, its procedures necessarily will become less flexible and more time-consuming, since "[c]lose judicial scrutiny inevitably leads to more formalized decision-making." *Hahn* v. *Gottlieb, supra,* 430 F. 2d at 1250. The effect will be to diminish the utility of informal review as an aid to agency supervision and enforcement.[43]

Moreover, if a security holder, who is not required to submit anything to the Commission, can appeal

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[43] See III Loss, *Securities Regulation* 1896 (2d ed., 1961):

> The more formalized the widely used interpretive service becomes, with arguments and perhaps exchange of memoranda or briefs on "appeal" to the Commission, the more cautious both Commission and staff are apt to become in expressing themselves in advance as to the applicability of the acts and rules to particular factual situations.

from a Commission decision of the character here involved, it would seem *a fortiori* that the company itself, which is required to submit its material to the Commission, could appeal from a determination unsatisfactory to it. Cf. *Hahn v. Gottlieb, supra,* 430 F. 2d at 1249. It might do so for reasons unrelated to the merits. For example, a management that expected to be voted out of office might be able to delay that event for a substantial period by appealing from Commission advice that its proxy materials are deficient.

At present, Commission review of proxy solicitation material (including security holder proposals) is conducted speedily, informally, and flexibly. Time is of the essence, since Commission review must be completed within a brief period after the material has been filed with the agency. The expedited handling of the large number of proxy matters submitted annually to the agency would be more difficult under the more formal decision-making process that the court of appeals decision contemplates.

To be sure, that decision applies directly only to security holder proposal disputes. But the agency considers a substantial number of these matters every year and, in light of present social and political trends, the number is rapidly increasing, so that the effects of the court's decision will not be insignificant even on this level alone. See Securities and Exchange Commission, *Thirty-sixth Annual Report* 47 (1971). Furthermore, disputes between security holders and companies in matters under review by the Commission occur not only with respect to security holder pro-

posals, but also with respect to other proxy matters (such as contests for corporate control and conflicts involving mergers) as well as in other areas within the Commission's jurisdiction. The rationale of the decision below suggests the possibility of broad scale judicial review of informal Commission determinations that heretofore have never been regarded as reviewable.[44]

In sum, the review sanctioned by the court below is likely to make the informal procedures which heretofore have enabled the Commission to handle a large and ever-increasing workload[45] more rigid and thus less useful. Such informal procedures, "designed to obviate hardship to the private interest from unnecessary or ill-advised action," through a "more effective and more flexible method of preventing unwanted things from happening," have been characterized as "truly the lifeblood of the administrative process."

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[44] The court of appeals held that review was here available because the Commission had upheld the staff's determination rather than merely declined to review it (App. 68). The court's theory, however, suggests that judicial review would also be available in the latter situation. See Note, *The SEC and "No-Action" Decisions under Proxy Rule 14a–8: The Case for Direct Judicial Review*, 84 Harv. L. Rev. 835, 864 (1971); Note, *Medical Committee for Human Rights* v. *SEC: Judicial Review of SEC No-Action Determinations under the Proxy Rules*, 57 Va. L. Rev. 331, 340 (1971).

[45] Last year, the Commission's staff processed materials relating to more than 5,500 proxy solicitations and more than 3,300 registration statements. In addition, the staff issued more than 5,000 no-action or informal advisory letters or opinions and responded to thousands of letters complaining of some alleged violation of the federal securities laws or seeking Commission enforcement action.

Report at 13, 35, 40. Since there are no significant benefits to be had by permitting judicial review of agency action of this sort, it should not be sanctioned. See *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, 130–132; Saferstein, *Nonreviewability: A Functional Analysis of "Committed to Agency Discretion,"* 82 Harv. L. Rev. 367, 390 (1968).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed and the case should be remanded to that court with instructions to dismiss the petition for review.

Respectfully submitted.

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JULY 1971.

APPENDIX

Relevant Statutes and Rules

Section 14(a) of the Securities Exchange Act of 1934, 48 Stat. 895, as amended, 15 U.S.C. 78n(a):

> It shall be unlawful for any person, by the use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security (other than an exempted security) registered pursuant to section 78*l* of this title.

Section 21(e) of the Securities Exchange Act of 1934, 48 Stat. 900, as amended, 15 U.S.C. 78u(e):

> Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this chapter, or of any rule or regulation thereunder, it may in its discretion bring an action in the proper district court of the United States or the United States courts of any Territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond. The Commission may

transmit such evidence as may be available concerning such acts or practices to the Attorney General, who may, in his discretion, institute the necessary criminal proceedings under this chapter.

Section 25(a) of the Securities Exchange Act of 1934, 48 Stat. 901–902, as amended, 15 U.S.C. 78y(a):

Any person aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person is a party may obtain a review of such order in the United States Court of Appeals within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall be forthwith transmitted by the clerk of the court to any member of the Commission, and thereupon the Commission shall file in the court the record upon which the order complained of was entered, as provided in section 2112 of Title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record shall be exclusive, to affirm, modify, and enforce or set aside such order, in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If either party shall apply to the

court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the hearing before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, and enforcing or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 346 and 347 of Title 28.

Rule 14(a)–8 under the Securities Exchange Act of 1934, 17 C.F.R. 240.14a–8:

Proposals of security holders.

(a) If any security holder entitled to vote at a meeting of security holders of the issuer shall submit to the management of the issuer, within the time hereinafter specified, a proposal which is accompanied by notice of his intention to present the proposal for action at the meeting, the management shall set forth the proposal in its proxy statement and shall identify it in its form of proxy and provide means by which se-

curity holders can make the specification provided for by Rule 14a–4(b) (§240.14a–4(b)). The management of the issuer shall not be required by this rule to include the proposal in its proxy statement for an annual meeting unless the proposal is submitted to the management not less than 60 days in advance of a day corresponding to the first date on which the management's proxy soliciting material was released to security holders in connection with the last annual meeting of security holders, except that if the date of the annual meeting has been changed as a result of a change in the fiscal year, a proposal shall be submitted a reasonable time before the solicitation is made. A proposal to be presented at any other meeting shall be submitted to the management of the issuer a reasonable time before the solicitation is made. This section does not apply, however, to elections to office or to counter proposals to matters to be submitted by the management.

(b) If the management opposes the proposal it shall also, at the request of the security holder, include in its proxy statement a statement of the security holder, in not more than 100 words, in support of the proposal, which statement shall not include the name and address of the security holder. The proxy statement shall also include either the name and address of the security holder or a statement that such information will be furnished by the issuer or by the Commission to any person, orally or in writing as requested, promptly upon the receipt of any oral or written request therefor. If the name and address of the security holder is omitted from the proxy statement, it shall be

furnished to the Commission at the time of filing the management's preliminary proxy material pursuant to Rule 14a–6(a) (§ 240.14a–6(a)). The statement and request of the security holder shall be furnished to the management at the same time that the proposal is furnished. Neither the management nor the issuer shall be responsible for such statement.

(c) Notwithstanding the foregoing, the management may omit a proposal and any statement in support thereof from its proxy statement and form of proxy under any of the following circumstances:

(1) If the proposal as submitted is, under the laws of the issuer's domicile, not a proper subject for action by security holders; or

(2) If it clearly appears that the proposal is submitted by the security holder primarily for the purpose of enforcing a personal claim or redressing a personal grievance against the issuer or its management, or primarily for the purpose of promoting general economic, political, racial, religious, social or similar causes; or

(3) If the management has at the security holder's request included a proposal in its proxy statement and form of proxy relating to either of the last two annual meetings of security holders or any special meeting held subsequent to the earlier of such two annual meetings and such security holder has failed without good cause to present the proposal, in person or by proxy, for action at the meeting; or

(4) If substantially the same proposal has previously been submitted to security holders, in the management's proxy statement and form of proxy, relating to any annual or special meet-

ing of security holders held within the preceding five calendar years, it may be omitted from the management's proxy material relating to any meeting of security holders held within the three calendar years after the latest such previous submission: *Provided,* That:

(i) If the proposal was submitted at only one meeting during such preceding period, it received less than 3 percent of the total number of votes cast in regard thereto; or

(ii) If the proposal was submitted at only two meetings during such preceding period, it received at the time of its second submission less than 6 percent of the total number of votes cast in regard thereto; or

(iii) If the proposal was submitted at three or more meetings during such preceding period, it received at the time of its latest submission less than 10 percent of the total number of votes cast in regard thereto.

(5) If the proposal consists of a recommendation or request that the management take action with respect to a matter relating to the conduct of the ordinary business operations of the issuer.

(d) Whenever the management asserts that a proposal and any statement in support thereof may properly be omitted from its proxy statement and form of proxy, it shall file with the Commission, not later than 20 days prior to the date the preliminary copies of the proxy statement and form of proxy are filed pursuant to § 240.14a–6(a), or such shorter period prior to such date as the Commission may permit, a copy of the proposal and any statement in support thereof as received from the security

holder, together with a statement of the reasons why the management deems such omission to be proper in the particular case, and, where such reasons are based on matters of law, a supporting opinion of counsel. The management shall at the same time, if it has not already done so, notify the security holder submitting the proposal of its intention to omit the proposal from its proxy statement and form of proxy and shall forward to him a copy of the statement of the reasons why the management deems the omission of the proposal to be proper and a copy of such supporting opinion of counsel.

17 C.F.R. 202.1(d):

The informal procedures of the Commission are largely concerned with the rendering of advice and assistance by the Commission's staff to members of the public dealing with the Commission. While opinions expressed by members of the staff do not constitute an official expression of the Commission's views, they represent the views of persons who are continuously working with the provisions of the statute involved. And any statement by the director, associate director, assistant director, chief accountant, chief counsel, or chief financial analyst of a division can be relied upon as representing the views of that divison. In certain instances an informal statement of the views of the Commission may be obtained. The staff, upon request or on its own motion, will generally present questions to the Commission which involve matters of substantial importance and where the issues are novel or highly

complex, although the granting of a request for an informal statement by the Commission is entirely within its discretion.

17 C.F.R. 202.2:

Pre-filing assistance and interpretative advice.

The staff of the Commission renders interpretative and advisory assistance to members of the general public, prospective registrants, applicants and declarants. For example, persons having a question regarding the availability of an exemption may secure informal administrative interpretations of the applicable statute or rule as they relate to the particular facts and circumstances presented. Similarly, persons contemplating filings with the Commission may receive advice of a general nature as to the preparation thereof, including information as to the forms to be used and the scope of the items contained in the forms. Inquiries may be directed to an appropriate officer of the Commission's staff. In addition, informal discussions with members of the staff may be arranged whenever feasible, at the Commission's central office or, except in connection with matters under the Public Utility Holding Company Act of 1935 and certain matters under the Investment Company Act of 1940, at one of its regional offices.

17 C.F.R. 202.3:

Processing of filings.

(a) Registration statements, proxy statements, letters of notification, periodic reports, applications for qualification of indentures, and similar documents filed with the Commission under the Securities Act of 1933 and the Trust Indenture Act of 1939, and certain filings under the Securities Exchange Act of 1934 and the Investment Company Act of 1940 are

routed to the Division of Corporation Finance, which passes initially on the adequacy of disclosure and recommends the initial action to be taken. If the filing appears to afford inadequate disclosure, as for example through omission of material information or through violation of accepted accounting principles and practices, the usual practice is to bring the deficiency to the attention of the person who filed the document by a letter from the Assistant Director assigned supervision over the particular filing, and to afford a reasonable opportunity to discuss the matter and make the necessary corrections. This informal procedure is not generally employed where the deficiencies appear to stem from careless disregard of the statutes and rules or a deliberate attempt to conceal or mislead or where the Commission deems formal proceedings necessary in the public interest. Where it appears that the filing affords adequate disclosure, acceleration of its effectiveness when appropriate normally will be granted.

A similar procedure is followed with respect to filings under the Public Utility Holding Company Act of 1935 and the Investment Company Act of 1940, which are routed to the Division of Corporate Regulation.

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